



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2006-0600; FRL-990-30-Region 6]

Approval and Promulgation of Implementation Plans; Texas; Revisions to New Source Review (NSR) State Implementation Plan (SIP); Emergency Orders.

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final Rule.

SUMMARY: EPA is taking final action to disapprove revisions to the State Implementation Plan (SIP) for the State of Texas that relate to Emergency Orders. This includes portions of SIP revisions that relate to Emergency Orders that were submitted by Texas on August 31, 1993; December 10, 1998; February 1, 2006; and July 17, 2006. EPA is disapproving these revisions because these regulations do not meet the requirements of the Clean Air Act (the “Act” or “CAA”), EPA regulations, and applicable policy and guidance. EPA is taking this action under section 110 and parts C and D of Title I of the Act.

DATES: This final rule is effective on **[Insert date 30 days from date of publication in the Federal Register]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2006-0600. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. To inspect the hard copy materials, please schedule an appointment with the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214-665-7253.

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Mohr, Air Permits Section (6PD-R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-7289; fax number (214) 665-6762; e-mail address mohr.ashley@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, “we,” “us,” and “our” means EPA.

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I. What Action is EPA Taking?

EPA is taking final action to disapprove the Texas Emergency Orders Program as submitted by Texas on August 31, 1993, as revised by the December 10, 1998, February 1, 2006, and July 17, 2006 SIP revision submittals. These submittals include the initial adoption of 30 TAC 116.410 through 116.418, the initial adoption of 30 TAC Chapter 35, and subsequent revisions to sections within these regulations. EPA has concluded that the Emergency Orders Program contained in these regulations does not meet the requirements of the Act and the EPA's New Source Review (NSR) regulations.

EPA proposed disapproval of the above SIP revision submittals on February 5, 2013 (78 FR 8076). We accepted comments from the public on this proposal from February 5, 2013 until March 7, 2013. A summary of the comments received and our evaluation and response thereof is discussed in section III below. In the proposal and in the Technical Support Document (TSD), we described our basis for the actions identified above. The reader should refer to the proposal, the TSD, section IV of this notice, and the Response to Comments in section III of this notice for additional information relating to our final action.

EPA is disapproving the submitted Texas Emergency Orders Program as not meeting all the requirements applicable to New Source Review (NSR). Specifically, the issuance of Emergency Orders to projects that are subject to Major NSR fail to meet the requirements of the CAA and the implementing regulations as follows:

- The Emergency Orders Program does not satisfy the public participation required for NSR at the time the Emergency Order is issued; and
- The Emergency Orders Program does not meet the requirement that a NSR permit be issued prior to the commencement of construction of a Major Source.

The provisions in these submittals relating to the Texas Emergency Orders Program that include the 30 TAC Chapter 116.410 through 116.418 and Chapter 35 regulatory provisions were not submitted to meet a mandatory requirement of the Act. Therefore, this final action to disapprove the submitted Texas Emergency Orders Program does not trigger a sanctions or Federal Implementation Plan clock. See CAA section 179(a).

II. What is the Background?

A. Summary of Our Proposed Action

On February 5, 2013, EPA proposed to disapprove revisions to the SIP submitted by the State of Texas that relate to the Emergency Orders Program. Texas submitted these SIP revisions on August 31, 1993; December 10, 1998; February 1, 2006; and July 17, 2006. Table 1 summarizes these SIP revision submittals and their associated affected provisions that we proposed to disapprove in our February 5, 2013 action.

Our February 5, 2013 proposal provides a detailed description of the submittals and the rationale for EPA's proposed action, together with a discussion of the opportunity to comment.

The public comment period for this action closed on March 7, 2013.

B. Summary of the Submittals Addressed in this Final Action

Tables 1 and 2 below summarize the changes that are in the SIP revision submittals. A summary of EPA's evaluation of each section and the basis for this final action is discussed in sections III through V of this notice. The TSD (which is located in the docket) includes a detailed evaluation of the submittals.

Table 1. Summary of Pending SIP Submittals Addressed in this Action

Description of SIP Submittal	Date Submitted to EPA	Date Adopted by State	Date Effective as State Rule	Sections Related to Emergency Orders
Original Recodification of Chapter 116	8/31/1993	8/16/1993	9/13/1993	<u>Chapter 116</u> : Submittal of sections 116.410 through 116.418
Emergency and Temporary Orders	12/10/1998	11/18/1998	12/10/1998	<u>Chapter 35</u> : Submittal of sections 35.1-35.3, 35.11-35.13, 35.21-35.30, and 35.801-35.809 <u>Chapter 116</u> : Revisions to section 116.410; Repeal of sections 116.411-116.418, which were replaced by sections 35.802-35.809
Federal New Source Review Permits Rules	2/1/2006	1/11/2006	2/1/2006	<u>Chapter 116</u> : Recodification of §116.410 to §116.1200
Revision to Provisions for Emergency Orders	7/17/2006	6/28/2006	7/19/2006	<u>Chapter 35</u> : Revisions to sections 35.801, 35.802, 35.804, 35.805, 35.807, and 35.808

Table 2. Summary of the Individual Revisions to Each Section Evaluated

Section – Title	Date Submitted to EPA	Adopted by State	Effective as State Rule	Comments
30 TAC Chapter 35 – Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permits Conditions				
Subchapter A – Purpose, Applicability, and Definitions				
Section 35.1 – Purpose	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.2 – Applicability	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.3 – Definitions	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter B – Authority of the Executive Director				
Section 35.11 – Purpose and Applicability	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.12 – Authority of the Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption

Section 35.13 – Eligibility of the Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter C – General Provisions				
Section 35.21 – Action by the Commission or Executive Director	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.22 – Term and Renewal of Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
§35.23 – Effect of Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.24 – Application for Emergency or Temporary Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.25 – Notice and Opportunity for Hearing	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.26 – Contents of Emergency or Temporary Orders	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.27 – Hearing Required	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.28 – Hearing Requests	12/10/1998	11/18/1998	12/10/1998	Initial adoption
§35.29 – Procedures for a Hearing	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Section 35.30 – Application Fees	12/10/1998	11/18/1998	12/10/1998	Initial adoption
Subchapter K – Air Orders¹				
Section 35.801 – Emergency Orders Because of Catastrophe	12/10/1998	11/18/1998	12/10/1998	Initial adoption
	7/17/2006	6/28/2006	7/19/2006	Revisions to section 35.801
§§35.802 – Application for an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.411
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.802; • Revisions to introductory paragraph; • Revisions to paragraphs (1) – (8); • New paragraph (9); and • Redesignate former paragraph (9) to paragraph (10) with revisions
	7/17/2006	6/28/2006	7/19/2006	Revisions to introductory paragraph (1) and paragraph (5).
Section 35.803 – Public Notification	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.412
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.803; and • Revisions to introductory paragraph

¹ On August 18, 1993, sections 116.411 through 116.418 were adopted under Chapter 116, Subchapter E – Emergency Orders. On November 18, 1998, these regulations were replaced with sections 35.802 through 35.809 and placed in Chapter 35, Subchapter K.

Section 35.804 – Issuance of an Emergency Order	12/10/1998	11/18/1998	12/10/1998	Initial adoption
	7/17/2006	6/28/2006	7/19/2006	Revision to paragraphs (1) and (1)(C)
Section 35.805 – Contents of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.415
	12/10/1998	11/18/1998	12/10/1998	Redesignated to section 35.805; and Revision to introductory paragraph and paragraphs (1) – (4)
	7/17/2006	6/28/2006	7/19/2006	<ul style="list-style-type: none"> • Reorganization of paragraph (3) to paragraphs (3), (3)(A), and (3)(B); • New paragraph 3)(C); • New paragraph (4); and • Redesignation of existing paragraph (4) to paragraph (5) with revisions
Section 35.806 – Requirement to Apply for a Permit or Modification	8/31/1993	8/16/1993	9/13/1993	Initial adoption as §116.416
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.806; and • Revisions to introductory paragraph
Section 35.807 – Affirmation of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.414
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.807; and • Revisions to the introductory paragraph, paragraphs (1)-(3); • New paragraph (4); • Redesignation of former (4)-(5) to paragraphs (5)-(6) with revisions
	7/17/2006	6/28/2006	7/19/2006	<ul style="list-style-type: none"> • Revisions to paragraph (1) • Reorganization of paragraph (5) into paragraphs (5), (5)(A), and (5)(B); and • New paragraph (5)(C)
Section 35.808 – Modification of an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.417
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.808; and • Revisions to paragraphs (1)-(3)
	7/17/2006	6/28/2006	7/19/2006	Revision to paragraph (1)
Section 35.809 – Setting Aside an Emergency Order	8/31/1993	8/16/1993	9/13/1993	Adopted as §116.418
	12/10/1998	11/18/1998	12/10/1998	<ul style="list-style-type: none"> • Redesignated to section 35.809; and • Revision to introductory paragraph

30 TAC Chapter 116 – Control of Air Pollution by Permits for New Construction or Modification				
Subchapter K– Emergency Orders				
Section 116.1200 – Applicability	8/31/1993	8/16/1993	9/13/1993	Initial adoption as section 116.410
	12/10/1998	11/18/1998	12/10/1998	Revised introductory paragraph
	2/1/2006	1/11/2006	2/1/2006	Redesignated to section 116.1200

In general, the regulations governing Emergency Orders are found in 30 TAC Chapter 35 – Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions. These regulations provide the process by which the Texas Commission on Environmental Quality (TCEQ) may issue a Temporary Order, Emergency Order, Mandatory Order, Permissive Order, and Prohibitory Order and include provisions that apply to both air orders and non-air orders. As part of this action, we are disapproving only those portions that are applicable to the issuance of air Emergency Orders. As noted in our proposed action on February 5, 2013, EPA returned the non-air portions of the aforementioned submittals to the State. Under the CAA, SIPs can only include provisions addressing air quality, so the portions of the Texas submittals related to non-air orders cannot be included in the SIP.²

Today, EPA is disapproving the regulations identified in Table 2 above, except for provisions that do not relate to the air quality requirements of the Act. EPA returned the following non-air portions of the submitted rules to the State: 30 TAC 35.13; 35.24(b) and (e)(6)-(7); and 35.25(e)(1)-(8) and (11)-(15). Other state and local agencies operate programs similar to the Emergency Orders Program. In these cases, the regulations containing the provisions related to those programs are located within the states' air quality permitting

² As part of this final rulemaking, we would like to provide clarification that a SIP is not limited only to provisions that address criteria pollutants and their precursors. Our intent in mentioning the scope of the SIP in our proposal (78 FR 8076, February 5, 2013) was only to differentiate between the air and non-air related provisions contained in the August 31, 1993, December 10, 1998, February 1, 2006, and July 17, 2006 SIP revision submittals. With this rulemaking, we are providing clarification that the SIP is limited to provisions that address air quality; therefore, the non-air portions of the SIP submittals received from Texas were returned to the state.

regulations, not in the SIP. EPA may exercise its enforcement discretion on a case-by-case basis to evaluate the owner or operator's proposed action in response to a catastrophe and utilize enforcement discretion to allow for appropriate immediate actions to minimize impacts and restore the sources to full operation.

III. Responses to Comments

The Federal Register proposing disapproval of these SIP revisions was published on February 5, 2013 at 78 FR 8076, and the public comment period closed on March 7, 2013. In response to our proposal, we received comments from the following: Baker Botts, L.L.P. on behalf of Business Coalition for Clean Air Appeal Group (BCCA); Baker Botts, L.L.P. on behalf of Texas Industry Project (TIP); and the Texas Commission on Environmental Quality (TCEQ). EPA has summarized the comments below; the complete comment letters received are available for review in the docket for this rulemaking.

Comment 1: TCEQ comments that the Emergency Orders rules are not intended to substitute for the SIP-approved NSR permitting processes, and the rules require that the regulated entities that are issued an Emergency Order are required to undergo the NSR permitting processing on a specific timeframe to obtain necessary NSR authorizations.

Response: EPA agrees that the Emergency Orders rules are not submitted as a substitute for the current SIP-approved NSR permitting process. However, the issuance of an Emergency Order under the submitted program precedes the NSR permitting process and authorizes construction prior to the SIP-approved NSR permitting process occurring. The CAA does not provide an option to authorize construction prior to the completion of the NSR permitting process. While the submitted rules require that a source obtain the necessary NSR

authorization(s) within a specified timeframe, the initial authorization via the Emergency Order allows a source to commence construction prior to the source undergoing the required NSR permitting process. Because the issued Emergency Order is the initial preconstruction authorization, the program must be evaluated to determine if it meets the applicable requirements for NSR.

Comment 2: TCEQ comments that the review of Emergency Orders applications and the orders themselves ensure or require compliance with the requirement that any construction or modification will not interfere with the attainment or maintenance of the NAAQS or violate applicable portions of the control strategy. TCEQ further comments that case-by-case enforcement discretion does not have the same protective outcome for the environment as the Emergency Orders Program and does not satisfy the public participation required for either major or minor NSR in the Clean Air Act.

Response: EPA is not disputing the merits of the technical review process that TCEQ facilitates as part of the Emergency Orders Program. However, Texas submitted the Emergency Orders Program as a revision to the State's SIP. Therefore, as part of this action we are evaluating the Emergency Orders Program to determine if it is consistent with the applicable CAA requirements, EPA regulations, and applicable policy and guidance.

EPA does not agree that the case-by-case enforcement discretion approach described in our proposed action does not have the same protective outcome for the environment as the Texas Emergency Orders Program. On page 78 FR 8081 of our proposed action, we described a real-world approach of applying the state-only Emergency Orders Program, including the review process outlined in the program rules, with case-by-case EPA enforcement discretion. This described approach would maintain the elements of the Texas Emergency Orders Program

technical review and couple it with the EPA's case-by-case evaluation of the owner or operator's proposed action in response to a catastrophe. Therefore, the approach discussed by EPA in our proposal would not be any less protective than a stand-alone Emergency Orders Program and can still allow for facilities to take appropriate immediate actions to bring a source back up to full operation and minimize additional impacts resulting from the catastrophe.

In response to TCEQ's statement regarding public participation requirements and enforcement discretion, the public participation requirements cited by EPA in our proposed action as the basis of our disapproval are applicable to SIP revisions that are submitted to EPA for review and approval into the SIP, and would not apply to our proposed utilization of EPA's enforcement discretion. As stated previously, on a case-by-case basis EPA would evaluate proposed actions in response to a catastrophe and would utilize its enforcement discretion to allow for appropriate immediate actions to minimize impacts and restore the sources to full operation.

Comment 3: TCEQ comments that the case-by-case approach described by EPA in the proposed action does not provide legal certainty of approved rules and forces companies to evaluate the costs of the risks of violating the CAA provisions at times when quick action is necessary. TCEQ states that the Emergency Orders rules allow regulated entities to obtain needed authorizations for immediate actions in response to natural disasters and other defined catastrophes while mitigating the economic risks regulated entities have to calculate and consider from fines and penalties associated with unauthorized air emissions that could hinder necessary immediate actions.

Response: The practice described in our proposal notice is simply a description of state-EPA interaction utilized by sources located in other states. Companies in those states are not

required to utilize this practice, and can use available SIP-approved permitting mechanisms to address their needs. Similarly, companies in Texas can address their needs using permitting mechanisms available in the Texas SIP.

Texas submitted the Emergency Orders Program as a revision to the State's SIP. Therefore, EPA is evaluating the SIP revision submittal to determine if the program meets the requirements of the CAA, EPA regulations, and applicable policy and guidance. In the case where a submitted SIP revision, like the Texas Emergency Orders Program, does not meet the applicable CAA requirements or is inconsistent with EPA regulations, policy, or guidance, we cannot approve that revision into a SIP.

Comment 4: TCEQ indicates that they had previously provided various documents to EPA during informal discussions to illustrate how the Emergency Orders rules are compliant with the CAA, and that they can provide this information again, if necessary.

Response: EPA did receive from Texas three orders signed by the TCEQ Commissioners affirming Emergency Orders previously issued by the Executive Director of the TCEQ. These documents were not persuasive in demonstrating that the Emergency Orders Program met the requirements of the CAA, as described in Section IV of this notice.³

Comment 5: TCEQ notes that EPA has approved similar rules for other states to address emergency conditions, including the rules for New Mexico.

Response: EPA is currently evaluating the rules currently approved into the New Mexico SIP to determine what action, if any, is needed to ensure that the State's SIP is consistent with the applicable CAA requirements, EPA regulations, and applicable policy and guidance. If it is

³ Rather, the orders showed that companies were allowed to construct and operate without prior public notice, and prior to the issuance of a SIP-approved permit. For example, one order (94-0722-AIR) allowed a facility to construct, operate, shut down, and dismantle two temporary boilers at a polypropylene unit at a chemical plant. The public was provided notice of the Emergency Order four days after the boilers were dismantled. The three orders submitted by Texas are available for review in the docket of this rulemaking.

determined that some action is needed regarding the New Mexico SIP, EPA will address that in a separate action and rulemaking. This final action addresses only those aforementioned SIP revision submittals submitted by Texas related to the State's Emergency Orders Program.

Comment 6: BCCA and TIP comment that the Emergency Orders Program satisfies all statutory requirements for SIP approval, including compliance with the NAAQS, and will often result in a facility that is issued an Emergency Order being subject to more stringent requirements than those that might otherwise be required.

Response: We do not agree that the Emergency Orders Program satisfies statutory requirements for SIP approval. As detailed in our proposed action, the proposed SIP revisions related to Emergency Orders do not meet all of the requirements applicable to NSR. Specifically, the issuance of Emergency Orders to projects that are subject to Major NSR fails to satisfy the public participation required for NSR at the time the order is issued and does not meet the requirement that a NSR permit be issued prior to the commencement of construction of a Major Source. The basis of our disapproval, as outlined in our proposed action, is that the Emergency Orders Program fails to meet these NSR requirements.

Comment 7: BCCA and TIP comment that many, if not most, projects eligible for an Emergency Order may not reflect a new major stationary source or a major modification, and that they are unaware of a situation in which an Emergency Order has been used to circumvent major NSR requirements. The commenters also state that Emergency Orders Program has been an appropriate complement to the minor NSR permitting requirements where prompt actions are necessary in response to a catastrophe. BCCA and TIP further comment that if EPA disapproves the Emergency Orders Program on the basis of Major NSR concerns, that EPA would be making the minor NSR program subject to the same requirements for SIP approval as Major NSR

programs. The commenters state that if EPA were to identify a proper basis to disapprove the program, EPA should do so to the most limited extent possible. BCCA and TIP reference a recent court decision that indicated that in cases where EPA had concerns that a state program would enable circumvention of Major NSR requirements, “EPA might have made use of its conditional approval authority” rather than disapproving the entire program.

Response: Under the submitted provisions found in 30 TAC Chapter 35, the TCEQ may issue an order under its Emergency Orders Program that authorizes immediate action for the addition, replacement, or repair of facilities, control equipment, or the repair or replacement of roads, bridges, and other infrastructure whenever a catastrophe necessitates such construction and emissions otherwise precluded under the Texas Clean Air Act. See 30 TAC 35.801. The Emergency Orders Program SIP revisions submitted by Texas for review by EPA do not limit the program solely to Minor NSR actions. The submitted SIP revisions and the proposed regulations contained in the submittals do not provide any indication that the program is limited only to Minor NSR.⁴ Therefore, EPA’s evaluation of the SIP revisions includes a comparison with Major NSR requirements. As noted in our proposed action, the Emergency Orders Program does not meet all applicable requirements for Major NSR.

We do not agree that the disapproval of the Emergency Orders Program on the basis of our Major NSR concerns would be making the State’s Minor NSR program subject to the same standards for SIP approval for Major NSR. The Emergency Orders Program as submitted by Texas applies to both Major and Minor NSR and, consequently, must be evaluated against all applicable federal requirements, including those for both Major and Minor NSR. Further, as we

⁴ In the December 10, 1998 SIP revision submittal, the record indicates that while it is not anticipated for most situations it is possible that construction at a facility in response to a catastrophe could trigger Major NSR. The record also indicates that the issuance of an Emergency Order to authorize Major NSR actions in response to a catastrophe under the proposed program is possible.

noted in our proposed action, the Minor NSR program requires public participation as part of the construction permitting process, see 40 CFR 51.161, which the Emergency Orders Program does not.⁵

Regarding conditional approvals, the CAA does provide that EPA may conditionally approve a SIP submittal “based on a commitment of the state to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision.” See CAA 110(k)(4). However, in order to conditionally approve the SIP revisions related to the Emergency Orders Program, we would need a commitment from Texas to make revisions to the submitted rules, as necessary, to address our concerns (including the concerns outlined in our proposed disapproval notice) and meet all applicable requirements. To date, EPA has not received any such commitment from Texas that would allow for EPA to use its conditional approval authority.

Comment 8: BCCA and TIP comment that they believe that the Emergency Orders Program is more stringent than the enforcement discretion approach recommended by EPA. The commenters state that an enforcement discretion approach provides no standards for an agency to allow construction or modification in response to a catastrophe; whereas, the Emergency Orders Program has specific requirements that must be met by an issued Emergency Order.

Response: The EPA’s enforcement discretion approach and the TCEQ’s Emergency Orders Program both provide a process for the agencies to follow when evaluating actions proposed by emission sources in response to catastrophes, including natural disasters. Both approaches achieve the overall goal of coordinating a review process in order to allow the source

⁵ The Minor NSR requirements for public participation are found at 40 CFR 51.161, and require prior to construction or modification the availability for public inspection of information regarding the construction (including the State’s analysis of the effect on air quality), a 30-day period for submittal of public comment, and a notice by prominent advertisement in the area affected. EPA recognizes a state’s ability to tailor the scope of its Minor NSR program as necessary to achieve and maintain the NAAQS. See 77 FR 74140.

to take appropriate actions in response to a catastrophe. The use of the different processes is not an issue of stringency. It is an issue of the most effective means available to the agencies to quickly achieve the overall goal.

IV. What are the Grounds for this Disapproval Action of the Texas Emergency Orders Program?

EPA is disapproving the revisions to the SIP submitted by the State of Texas that relate to the Emergency Orders Program, identified in Tables 1 and 2. EPA proposed disapproval of the Emergency Orders Program and solicited public comments. EPA has reviewed and responded to the comments (including adverse comments), and EPA is taking this final action to disapprove the Emergency Orders Program based on the reasons discussed below.

Based on our evaluation, EPA has found that the proposed Emergency Orders Program does not meet all applicable requirements of the CAA, EPA regulations, and applicable policy and guidance. Specifically, the issuance of Emergency Orders to projects that are subject to Major NSR fail to meet the requirements of the Clean Air Act and the implementing regulations as described below:

A. The Emergency Orders Program does not satisfy the public participation required for NSR at the time the Emergency Order is issued

As stated in our proposed action, the Emergency Orders Program fails to satisfy the public participation requirements for Major NSR at the time the Emergency Order is issued. Instead, the applicable public participation for Major NSR projects will take place after the issuance of the Emergency Order when the applicant submits their application for a Major NSR permit. Meanwhile, the applicant is authorized by the Emergency Order to begin construction of

the Major NSR project prior to permit application submission and permit issuance.

Consequently, the public is not afforded an opportunity to review and comment on the proposed project (as required under the CAA and implementing regulations) until after construction has begun; thus the public has not been provided meaningful opportunity to participate prior to commencement of construction of the Major NSR project. See 40 CFR 51.161 and 51.166(q).

B. The Emergency Orders Program does not meet the requirement that a NSR permit be issued prior to the commencement of construction of a Major Source

While EPA agrees with commenters that the Emergency Orders Program will not replace the current SIP approved NSR permitting processes, including Major NSR, the program does provide an interim authorization for immediate action, including construction, following a catastrophe via the issuance of an Emergency Order. The issued order is not a final issued Major NSR permit. If the proposed action authorized under an Emergency Order is subject to Major NSR, the Emergency Orders Program requires that the source apply for a Major NSR permit within 60 days following the issuance of the order. These permits are required to be applied for and issued in accordance with the applicable NSR requirements. However, the NSR permitting would occur following the commencement of construction at the source, which is not consistent with the CAA requirements. For PSD see CAA at §165(a)(1) and 40 CFR 51.166(a)(7)(iii). For NNSR see CAA §172(c)(5) and 40 CFR 51.165(a)(2)(i)-(iii).

In summary, for the reasons stated above, the submitted Emergency Orders Program is not approvable in the Texas SIP because it does not meet all of the applicable requirements of the CAA, EPA regulations, and applicable policy and guidance. Some commenters state that EPA could limit its disapproval of the Emergency Orders Program by exercising its conditional approval authority. As discussed in our response to comments, a conditional approval requires a

commitment from the State to make revisions to the submitted rules, as necessary, to address our concerns and meet all applicable requirements. See CAA 110(k)(4). To date, EPA has not received any commitment from Texas that would allow for EPA to use its conditional approval authority.

Therefore, for the reasons discussed above, we are taking final action to disapprove the SIP revision submittals relating to the Texas Emergency Orders Program as submitted by Texas on the August 31, 1993, December 10, 1998, February 1, 2006, and July 17, 2006.

V. Final Action

EPA is disapproving the Texas Emergency Orders Program submitted in a series of SIP revisions, identified in the Tables in section II of this preamble. These affected provisions are addressed in the August 31, 1993, as revised by the December 10, 1998, February 1, 2006, and July 17, 2006 SIP revision submittals submitted by Texas.

EPA is disapproving the aforementioned SIP revisions submittals because these regulations do not meet the requirements of the CAA, EPA regulations, and applicable policy and guidance. EPA is taking this action under section 110 and parts C and D of Title I of the Act. We are not taking on action the non-air portions of the referenced SIP revision submittals, which are beyond the scope of the SIP and were returned to the State.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

This final action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*, because this SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply disapproves certain State requirements for inclusion into the SIP. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. This rule does not impose any requirements or create impacts on small entities. This SIP disapproval under

section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new requirements but simply disapproves certain State requirements for inclusion into the SIP.

Accordingly, it affords no opportunity for EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule.

The fact that the Clean Air Act prescribes that various consequences (e.g., higher offset requirements) may or will flow from this disapproval does not mean that EPA either can or must conduct a regulatory flexibility analysis for this action. Therefore, this action will not have a significant economic impact on a substantial number of small entities.

We continue to be interested in the potential impacts of this rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538 “for State, local, or tribal governments or the private sector.” EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action disapproves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Executive Order 13132, entitled “Federalism” ([64 FR 43255](#), August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

“Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175, Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (59 FR 22951, November 9, 2000), because the SIP EPA is disapproving would not apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it because it is not an economically significant

regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This SIP disapproval under section 110 and subchapter I, part D of the Clean Air Act will not in-and-of itself create any new regulations but simply disapproves certain State requirements for inclusion into the SIP.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this action is not subject to requirements of Section 12(d) of NTTAA because application of those requirements would be inconsistent with the Clean Air Act.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent

practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this action. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely disapproves certain State requirements for inclusion into the SIP under section 110 and subchapter I, part D of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days from date of publication of this document in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: September 4, 2013.

Ron Curry,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52 - APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS – Texas

2. Section 52.2273 is amended by adding paragraph (h) to read as follows:

§ 52.2273 Approval status.

* * * * *

(h) EPA is disapproving the Texas SIP revisions submittals under 30 TAC Chapter 35 – Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions and 30 TAC Chapter 116 – Control of Air Pollution by Permits for New Construction or Modification as follows:

(1) The following provisions under 30 TAC Chapter 35, Subchapter A – Purpose, Applicability and Definitions:

(i) 30 TAC 35.1 – Purpose – adopted November 18, 1998 and submitted December 10, 1998.

(ii) 30 TAC 35.2 – Applicability – adopted November 18, 1998 and submitted December 10, 1998.

(iii) 30 TAC 35.3 – Definitions – adopted November 18, 1998 and submitted December 10, 1998.

(2) The following provisions under 30 TAC Chapter 35, Subchapter B – Authority of the Executive Director:

(i) 30 TAC 35.11 – Purpose and Applicability – adopted November 18, 1998 and submitted December 10, 1998.

(ii) 30 TAC 35.12 – Authority of the Executive Director – adopted November 18, 1998 and submitted December 10, 1998.

(iii) 35.13 – Eligibility of the Executive Director - adopted November 18, 1998 and submitted December 10, 1998.

(3) The following provisions under 30 TAC Chapter 35, Subchapter C – General Provisions:

(i) 30 TAC 35.21 – Action by the Commission or Executive Director – adopted November 18, 1998 and submitted December 10, 1998.

(ii) 30 TAC 35.22 – Term and Renewal of Orders – adopted November 18, 1998 and submitted December 10, 1998.

(iii) 30 TAC 35.23 – Effect of Orders – adopted November 18, 1998 and submitted December 10, 1998.

(iv) 30 TAC 35.24 – Application for Emergency or Temporary Orders – adopted November 18, 1998 and submitted December 10, 1998. No action is taken on subsection (b) and paragraphs (e)(6)-(7) which are outside the scope of the SIP.

(v) 30 TAC 35.25 – Notice and Opportunity for Hearing – adopted November 18, 1998 and submitted December 10, 1998. No action is taken on paragraphs (e)(1)-(8) and (11)-(15) which are outside the scope of the SIP.

(vi) 30 TAC 35.26 – Contents of Emergency or Temporary Order – adopted November 18, 1998 and submitted December 10, 1998.

(vii) 30 TAC 35.27 – Hearing Required – adopted November 18, 1998 and submitted December 10, 1998.

(viii) 30 TAC 35.28 – Hearing Requests – adopted November 18, 1998 and submitted December 10, 1998.

(ix) 30 TAC 35.29 – Procedures for a Hearing – adopted November 18, 1998 and submitted December 10, 1998.

(x) 30 TAC 35.30 – Application Fees – adopted November 18, 1998 and submitted December 10, 1998.

(4) The following provisions under 30 TAC Chapter 35, Subchapter K – Air Orders:

(i) 30 TAC 35.801 – Emergency Orders Because of a Catastrophe – adopted November 18, 1998 and submitted December 10, 1998; revised June 28, 2006 and submitted July 17, 2006.

(ii) 30 TAC 35.802 – Applications for an Emergency Order – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.411); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.802); revised June 28, 2006 and submitted July 17, 2006.

(iii) 30 TAC 35.803 – Public Notification – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.412); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.803).

(iv) 30 TAC 35.804 – Issuance of an Emergency Order – adopted November 18, 1998 and submitted December 10, 1998; revised June 28, 2006 and submitted July 17, 2006.

(v) 30 TAC 35.805 – Contents of an Emergency Order – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.415); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.805); revised June 28, 2006 and submitted July 17, 2006.

(vi) 30 TAC 35.806 – Requirement to Apply for a Permit or Modification – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.416); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.806).

(vii) 30 TAC 35.807 – Affirmation of an Emergency Order – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.414); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.807); revised June 28, 2006 and submitted July 17, 2006.

(viii) 30 TAC 35.808 – Modification of an Emergency Order – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.417); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.808); revised June 28, 2006 and submitted July 17, 2006.

(ix) 30 TAC 35.809 – Setting Aside an Emergency Order – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.418); revised November 18, 1998 and submitted December 10, 1998 (as redesignated to 30 TAC 35.809).

(5) The following provision under 30 TAC Chapter 116, Subchapter K – Emergency Orders: 30 TAC 116.1200 – Applicability – adopted August 16, 1993 and submitted August 31, 1993 (as 30 TAC 116.410); revised November 18, 1998 and submitted December 10, 1998; revised January 11, 2006 and submitted February 1, 2006 (as redesignated to 30 TAC 116.1200).

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